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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

VICTOR SPILOTRO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner Victor Spilotro respectfully prays that a writ of certiorari be issued to the Supreme Court of the State of Illinois to review its order affirming a judgment of conviction in the Criminal Court of Cook County, Illinois, adjudging petitioner guilty of conspiracy to receive stolen property and of receiving stolen property and sentencing him to a term of one to five years imprisonment.

OPINION BELOW

Trial was had to the court without a jury and the court delivered no written opinion.

The opinion of the Supreme Court is set out in pp. 11 to 22 of the record filed here; and is also reported in 28 Ill. 2d 322; 192 N.E. 2d 359 (under *People* v. *Hansen*). The court below also denied the petitioner's petition for a rehearing (R. 26).

JURISDICTION OF THIS COURT

1. The date of judgment sought to be reviewed was entered September 26, 1963 (R. 26). This petition for certiorari is filed within ninety days of the denial of the petition for rehearing.

2. This court's jurisdiction is invoked under Title 28, U.S.C., Section 1257(3) and Rule 22 (1) of the Rules of this court.

QUESTIONS PRESENTED FOR REVIEW

1. Where a state convicted a defendant on charges of receiving stolen property and conspiracy so to do without any evidence in the record that the property either was stolen or that there was proof of ownership of the alleged stolen property as set out in the indictment, is it not violative of due process of law under the Fourteenth Amendment to the Constitution to permit such conviction?

2. Where a state passes a law reducing the punishment for an offense while a defendant's appeal is being processed and before execution of the sentence, is it not a deprivation of the Fourteenth Amendment to the Constitution of the United States for the state to refuse to modify the sentence in accordance with the law in existence at the time the sentence is to be executed?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are as follows:

1. The Fourteenth Amendment to the Constitution of the United States.

2. Section 4, Chapter 131, Ill. Rev. Stat. 1961.

3. Section 8-2(c), Chapter 8, Ill. Rev. Stat. 1961.

4. Section 16-1, Chapter 38, Ill. Rev. Stat. 1961.

THE FACTS

Petitioner, together with two others, Hansen and Gates, were indicted for receiving stolen property and in three other counts with conspiracy so to do (R. 3, pp. 1-2).[1] Ronald Narbut, a burglar facing trial on the charges here and other unrelated matters, testified to a series of transactions involving Hansen, a Chicago Police officer regarding hair dryers, allegedly stolen. He said on one occasion petitioner was with Hansen and negotiated with Narbut for the hair dryers.

It was shown by the state that the J. B. Williams Company, a manufacturer, shipped a load of hair dryers by truck consigned to the Jewel Tea Company in Barrington, Illinois. The driver who picked up the loaded trailer in New Jersey delivered it unsealed to an undisclosed destination in LaSalle County. On August 29, 1961, a driver for the Chicago Express, Inc. picked up a trailer at the Pennsylvania Railroad in Chicago. He brought it to the Allied Shippers and Receivers Association, the consignee, and left it at the place designated by the Allied manager (R. 5, p. 8). The Allied manager refused to accept the trailer but permitted it to be left on the premises. The next day the trailer was gone. There was no evidence relating to the actual removal from the trailer of any contents therein.

Narbut gave (according to Hansen) or sold (according to Narbut) five dryers to Hansen. The five dryers cost Hansen $4.00 apiece and five irons were $5.00. Defendant, according to Narbut, gave $110 to Narbut and told him to keep the change (R. 5, p. 9).

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[1] "R" refers to the Record as filed in this court; and the pages indicated are to the printed material found at the Record page number.

Some time later, police officers of Chicago executed a search warrant at Hansen's home and found five hair dryers and a carton bearing the numbers 11825, coinciding with the number on a bill of lading assigned to the original shipment from J. B. Williams and Company (R. 5, pp. 8-9).

Petitioner, together with Hansen and Gates,[2] were convicted of receiving stolen property and conspiracy thereof (R. 3, p. 51). Petitioner was sentenced to a term of one to five years on December 18, 1961 (R. 3, p. 52); and the execution of the sentence was stayed pending his appeal.

Petitioner filed a motion in the trial court on August 15, 1962 to modify and reduce the sentence imposed on the ground that the law had been changed to provide for a maximum punishment of one year for the offense of which he was convicted. Said motion was denied (R. 3, p. 53).

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[2] Gates' conspiracy conviction was reversed by the Illinois Supreme Court on Nov. 26, 1963. His conviction on receiving stolen property was sustained. The opinion is not yet reported.

REASONS FOR THE ALLOWANCE OF THE WRIT

I.

The only matters brought into evidence against petitioner were five hair dryers of the retail value of $8.95, which were found in the home of Hansen. The state failed to prove that anything was stolen from shipment No. 11825. That shipment was traced to LaSalle County from New Jersey and was simply dropped. Then the state introduced evidence designed to show that goods of an undisclosed nature were taken from a trailer that was picked up at the Pennsylvania Railhead in Chicago bearing no visible relationship to the trailer dropped in LaSalle County. The trailer dropped in LaSalle County was routed through K & R Delivery and consisted of 167 cartons. Those 167 cartons were signed for by K and R Delivery on September 6, 1961, *a week after* the trailer from the Chicago-Pennsylvania Railhead was found empty (R. 3, Exhibits 3 and 5 at pp. 54 and 56 thereof.) The Pennsylvania Railhead trailer from which the theft is supposed to have occurred, was transported by Chicago Express, Inc. and not by K and R Delivery (R. 3, p. 8).

Under these circumstances then, there was a total failure of proof by the state that any theft of the particular hair dryers introduced into evidence occurred. There was no testimony on the part of the consignee, Jewel Tea Company, that the dryers were not received. The only testimony by any representative of the Jewel Tea Company was as to the value of the hair dryers and not that the dryers were not received. Accordingly, the alleged purchase of these dryers could not possibly constitute a crime.

To convict where there is a lack of evidence as here is a violation of the due process clause of the Fourteenth

Amendment to the Constitution of the United States. *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L. Ed. 2d 207 (1961).

In addition, the state failed to prove ownership of the alleged stolen property. Proof of ownership is necessary to protect a defendant against a similar charge in violation of the constitutional prohibition against double jeopardy. The indictment alleged in the alternative that the hair dryers had been stolen from the Chicago Express, Incorporated (Count 1 and 5) and from Allied Shippers and Receivers Association (Count 2 and 6) (R. 5, p. 15). The Chicago Express driver said he left the shipment with the consignee, Allied, at the place designated by that consignee. This would have terminated Chicago Express's relationship to the shipment and placed custody in Allied. The Allied man, on the other hand, admitted that the trailer had been delivered to him, but stated that he "did not accept the trailer because we couldn't handle it. We couldn't unload it that day." (He admitted, however, that the trailer had been left at Allied's premises with his approval.)

Since both Allied and Chicago Express disclaimed proprietary interest in the shipment, the state failed to prove the charge as alleged.

II.

Petitioner's constitutional rights were violated when the trial court imposed an excessive sentence in denying his motion to reduce that sentence when the law was changed before execution of the sentence.

Petitioner was sentenced on December 18, 1961, just thirteen days before January 1, 1962, the date a new State of Illinois Criminal Code became effective (R. 22). Under

the new code (Ill. Rev. Stat. 1961, Chapter 38, Par. 34-4) the maximum penalty for each of the offenses of which defendant was convicted was imprisonment for one year (See Ill. Rev. Stat. 1961, Chapter 38, Pars. 16-1 and 8-2(c)) as compared with the five year maximum imposed under the prior code (R. 22). On August 15, 1961, while review was pending in the Supreme Court of Illinois, petitioner made a formal motion in the trial court for a reduction of his sentences to conform penalties within the limits of the new code. The motion was denied (R. 22).

The Supreme Court of Illinois sustained the denial of the motion to reduce the sentence on the ground that the Statutory Construction Act of Illinois, Ill. Rev. Stat. 1961, Chapter 131, par. 4, provided that a punishment mitigated by new law is applicable only to judgments after the new law takes effect (R. 22). But this holding by the Illinois Supreme Court is a violation of due process of law under the Fourteenth Amendment to the Constitution.

If persons indicted in 1961 for an offense in 1961 were not put to trial until 1962, or if persons tried for an offense similar to petitioners in 1961 and convicted in 1961 but not yet sentenced in 1962, their sentences would be considerably less than that of petitioner's—less by four years. The "accident" of the date of sentencing ought not punish a petitioner where the Legislature of a state has announced as a public policy the reduction of a penalty for offenses of the class submitted by petitioner. *Griffin* v. *United States*, 175 F. 2d 193, 6 Cir., (1949).

At the time of sentencing, the trial court was faced with a clear legislative declaration that possession of stolen property of a value less than $150 should no longer be treated as a felony. (The total value of the alleged stolen property here was proved by the state to be $89.50).

This declaration was part of an overall revision of the Criminal Code and to facilitate the orderly administration of that Code, it was wisely provided that it should take effect at the beginning of the following year. The offense was alleged to have been committed *after* the amendment had completed the process of receiving legislative and executive approval. The trial was completed November 30, 1961. Judgment was not entered until December 18, 1961, when post trial motions were denied. Surely, simple justice required that defendant be given the benefit of the two week difference between December 18, 1961 and January 1, 1962.

It is a two week difference between felony and misdemeanor—between one year and five years.

It was clearly the legislative intent that the receipt of stolen property of the value of $89.50 should be only a misdemeanor on September 11, 1961, the alleged date of offense. It was further clearly intended, that a conspiracy so to do should receive no greater punishment (Chapter 38, Section 8-2(c) Ill. Rev. Stat. 1962).

The sentence of the petitioner was never executed in any part. The mittimus was stayed upon his application for a bond for appeal (R. 3, p. 52). The sentence is as yet not executed, as the mandate of the Supreme Court of Illinois was stayed pending such time as this court rules upon the petition for certiorari (R. 28). This review is a direct continuation of the proceedings in the state, without any lapse of time between the imposition of sentence and the commencement of proceedings on appeal. The new act has already taken effect; the judgment has not.

Your Honors held in *United States* v. *Chambers*, 291 U.S. 217 at 226 that under circumstances such as here, the imposition of sentence should be in accordance with the reduced statutory limitation.

It seems that the Supreme Court of Illinois by the decision in this case overruled the decisions in *People* v. *Guagliata*, 362 Ill. 427, 434-436 and *People* v. *Speroni*, 273 Ill. App. 572, 573, wherein the court stated:

> "Since the conviction here, and pending this writ of error, the act under which defendant in error was convicted has been repealed without a savings clause . . . As stated in *Vance* v. *Rankin*, 194 Ill. 625, the court of review will take judicial notice of said repeal, and 'it is well settled that if a statute giving a special remedy is repealed without a savings clause in favor of pending suits, all suits must stop where the repeal finds them . . . If a case is appealed, and pending the appeal the law is changed, the Appellate Court must dispose of the case under the law in force when their decision is rendered.'"

CONCLUSION.

For the foregoing reasons, we respectfully urge that this petition for certiorari be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that I have cause to be served the foregoing petition for certiorari by mailing three copies thereof to the Attorney General of the State of Illinois, Springfield, Illinois, and three copies thereof to the State's Attorney of Cook County, Illinois.

.....

JULIUS LUCIUS ECHELES

APPENDIX A

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT FOURTEEN

Section 1:

"... nor shall any State deprive any person of Life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ILLINOIS REVISED STATUTES, 1961
Chapter 38, Section 492

"Every person who ... shall buy, receive or aid in concealing stolen goods ... knowing the same to have been so obtained shall be imprisoned in the penitentiary not less than one nor more than ten years, or if such goods or other property or thing does not exceed the value of $50, he shall be fined not exceeding $1,000 and confined in the County Jail not exceeding one year."

ILLINOIS REVISED CRIMINAL CODE PASSED BY THE LEGISLATURE AND APPROVED JULY 28, 1961, TO TAKE EFFECT JANUARY 1, 1962.

Chapter 38, Section 16-1—A person commits theft when he knowingly (d) obtains control or stolen property not the property to have been stolen by another.

"A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

Chapter 38, Section 8-2(c):

"A person convicted of conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy."

ILLINOIS REVISED STATUTES, 1961

Chapter 131, Section 4:

"No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act."